IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC. and REACH ONE, TEACH ONE OF AMERICA, INC.,	)
Plaintiffs,	)
	)**Civil Action No.: 3:06-cv-224-WKW**
v.	)
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)
Defendant.	)

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, Macon County Investments ("MCI") and Reach One, Teach One of America ("Reach One, Teach One") and hereby submit this Response in Opposition to the Defendant's Motion for Summary Judgment:

I. THE ISSUE OF STANDING HAS ALREADY BEEN ADDRESSED BY THIS COURT

A. THE PLAINTIFFS HAVE STANDING THROUGH THEIR STATUS AS' APPLICANTS

The Defendant previously contested the Plaintiffs' standing to bring this lawsuit in his Motion to Dismiss the Original Complaint. The Court noted that Reach One, Teach One had standing, and that MCI simply needed to amend its Complaint to show that it was also an applicant. MCI subsequently cured that defect. The Defendant again sought to dismiss the Amended Complaint. The Court denied that Motion. Now, the Defendant asserts that the Plaintiffs do not have standing 1) because Reach One, Teach One is "sham" organization and 2) because MCI have not met the requirements set forth in the promulgated rules.

Reach One, Teach One is not sham organization. Issues with IRS filings do not make Reach One, Teach One a sham organization. Further, those issues do not negate the work and the activities conducted by Reach One, Teach One as a non-profit organization. Additionally, the fact that MCI has not met the requirements set forth in the promulgated rules is evidence of the impossibility of the rules created by the Sheriff to ensure a monopoly in Macon County. This impossibility of organizations, such as Reach One, Teach One and MCI, to be able to meet the qualifications is the basis for the equal protection claim.

Reach One, Teach One applied for a Class B Bingo License. MCI applied to operate a qualified location for Class B Bingo License and served as a surety to Reach One, Teach One's application. These facts alone give the Plaintiffs standing.

B. THE PLAINTIFFS HAVE NO ADMINISTRATIVE REMEDIES TO EXHAUST

The Sheriff's remedies allow for an administrative appeal to review his decision made on an application. To date, the Sheriff has not made a decision on the application submitted by MCI and Reach One, Teach One. Therefore, the appeal process set forth in the rules do not apply to them, and the Plaintiffs had no other remedy to seek relief but to assert this equal protection before the Court. The Defendant's failure to rule upon the application can not now be used as means to deny MCI and Reach One, Teach One ability seek in Court.

II. THE PLAINTIFFS HAVE PROPERLY ASSERTED AN EQUAL PROTECTION CLAIM

The growing trend in equal protection claims is the "class of one" claim. The class of one claim as articulated in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074, 145 L. Ed. 2d 1060 (2000) provides that a successful equal protection claim is one where "the plaintiff alleges that she has been intentionally treated from others similarly situated and that there is no rational basis for the difference in treatment." The plaintiff in *Olech* requested that the defendant Village connect their property to its water supply. The Village required the Plaintiff to grant it a 33-foot easement to fulfill her request. Previously, the Village only required property owners to grant a 15-foot easement. The plaintiff filed suit against the Village alleging that the additional requirement was violative of the Equal Protection Clause of the Fourteenth Amendment. The plaintiff claimed that the requirement was not rational, was arbitrary and was the result of ill will. *Olech*, 120 S. Ct. at 1074. The Court held that the plaintiff's assertions that the Village's requirement was irrational and arbitrary was "sufficient to state a claim for relief under traditional equal protection analysis" *Olech*, 120 S. Ct. at 565. Using this framework, the Plaintiffs' equal protection claim survives summary judgment.

A. THE PLAINTIFFS HAVE ALLEGED THAT THEY ARE BEING TREATED DIFFERENTLY THAN OTHERS

As the Plaintiffs state in their Complaint, the Defendant Sheriff's actions only serve to treat MCI and Reach One, Teach One differently than the current and Class B Bingo licensed facility operating in Macon County. (Complaint ¶ 22). These allegations are more than mere conclusory statements. They are specific in the nature and content of the Defendant Sheriff's actions.

MCI and Reach One, Teach One have alleged that previous applicants seeking a Class B Bingo license in Macon County were only required to have one (1) non-profit organization and that the location of the facility, including the land, building and improvements, had to be at least $5 million in value. In fact, the sole Class B Bingo licensed facility in Macon was granted a license to operate under these requirements. However, now that the Plaintiffs are seeking to secure a Class B Bingo license in Macon County, the Defendant Sheriff has a requirement that fifteen (15) non-profit organizations must submit an application and that the location of the facility, including the land, building and improvements, be at least $15 million in value. These allegations serve as the basis of the Plaintiffs assertion that they are being treated differently from others.

Upon development of the record through discovery, the Plaintiffs will show that there are similarly situated individuals/entities that received different treated, namely the current and Class B Bingo licensed facility in Macon County. This fact is already patent in the Complaint and underscored in the Sheriff's Motion to Dismiss by referencing that the Plaintiffs have not built a multi-million dollar facility before applying for the license. This is an absurd rule apparently designed to restrict the gaming market to a sole licensed Class B Bingo facility in Macon County. At this stage, the Plaintiffs need only allege the differential treatment. The Plaintiffs' allegations are sufficient to state a cause of action for the violation of the Equal Protection Clause. As such, the Defendant's Motion for Summary Judgment should be denied.

B. THE PLAINTIFFS HAVE ALLEGED THAT THE DEFENDANT'S PROMULGATED RULES ARE IRRATIONAL AND ARBITRARY

The plaintiff in *Olech* merely asserted that the defendant's requirements were irrational and arbitrary, and thus, resulted in a violation of the Equal Protection Clause. MCI and Reach One, Teach One have made similar allegations. The Plaintiffs allege that there is no rational basis for the increase in the number of required non-profit organizations to obtain a license; there is no rational basis for limiting the number of non-profit organizations which can receive a license in Macon County to sixty (60); nor is there any rational basis for the Defendant Sheriff's delay in consideration of the Plaintiffs' application or the failure to issue a license. When the liberal standards of pleading are applied, these allegations are sufficient to survive a Motion to Dismiss. *See APT Tampa/Orlando v. Orange County and the Bd. of Commissioners*, 1997 WL 33320573 [No. 97-891-CIV-ORL-22] (Dec. 10, 1997 M.D. Fla.).

The rules, as currently amended, are not only irrational, but compliance is impossible to achieve. The number of Class B Bingo licenses which can be issued in Macon County is limited to sixty (60) non-profit organizations. More than forty-five (45) licenses have already been issued for the operation of the sole bingo gaming facility in Macon County. Therefore, it would be impossible for an applicant to submit fifteen (15) non-profit organizations as potential licensees. The Defendant Sheriff also states that MCI and Reach One, Teach One have not actually built a location valuing $15 million. However, it is highly inconceivable and unfair to expect an applicant would completely build a facility worth $15 million prior to the issuance of a license to operate a gaming facility. These rules and the actions taken under the rules promulgated by the Defendant Sheriff are irrational and are arbitrary. The rules serve no purpose other than to discriminate against and exclude the Plaintiffs from operating a Class B Bingo facility in Macon County.

III. THE SHERIFF'S ARTICULATED REASONS FOR DISCRIMINATION ARE NOT REASONABLY RELATED TO A GOVERNMENT INTEREST

The United States Supreme Court has held that "the [regulator] may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary and irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985). A distinction is deemed to be arbitrary and irrational when there is an inadequate or nonexistent connection between the classification and purpose. The United States Supreme Court has invalidated discriminatory classifications for these reasons. *Alleghany Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 344-45, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 621-22, 105 S. Ct. 2862, 86 L. Ed. 2d 487 (1985); *Williams v. Vermont*, 472 U.S. 14, 25-27, 105 S. Ct. 2465. 86 L. Ed. 2d 11 (1985).

In *Lindsey v. Normet*, the state argued that requiring tenants who challenged eviction proceedings to post bond twice the amount of rent was done to protect losses incurred by the landlord. The Court held that this requirement was unrelated to actual rent accrued or to specific damage to the landlord. Additionally, the requirement imposed a substantial barrier to appeal faced by no other civil litigant. The Court concluded that there was "no reasonable relationship to any valid state objective" and that the requirement was "arbitrary and irrational."

Similarly, in *Romer v. Evans*, 517 U.S. 620, 635, 116 S. Ct. 1620 (1996), the United States Supreme Court held that a Colorado statute prohibiting any governmental action to protect persons based upon their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships" was so far removed from the state's cited interest of respecting freedom of association and conserving resources in fighting discrimination that it was "impossible to credit them." The Court further stated that it could not hold that the statute served some legitimate purpose. Instead, the statute was far-reaching and was not rationally related to a legitimate governmental purpose. *Romer*, 517 U.S. at 635.

In this case, the Sheriff's articulated reasons for promulgating discriminatory rules are not reasonably related to a legitimate government interest. The Sheriff states that requiring applicants to have a $5 million (later amended to $15 million) structure in place before a facility can be deemed a qualified location serves the purpose of preventing trailers from being erected and demonstrating a substantial commitment to Macon County. Applicants can surely build suitable structures for less than $5 million and $15 million. Further, the Sheriff could verify the value of a proposed facility before construction is complete. With their application, MCI and Reach One, Teach One provided evidence that the structure would be valued at least $15 million once completed. It is unreasonable to require an applicant to build a $15 million structure and hope that they will be granted a license. Similar to the legislation in *Lindsey*, this requirement imposes a substantial barrier to applicants seeking licensure pursuant to Amendment 744. The Sheriff admits that there was no rhyme or reason to the $5 million and $15 million amounts to determine the level of commitment and investment to Macon County. This requirement is arbitrary, and it cannot be held to have a rational relationship to any governmental interest.

The Sheriff states that requiring at least 15 nonprofit organizations to apply before bingo can be operated a qualified location was done to allow more nonprofit organizations to gain the benefits from bingo in Macon and to prevent a qualified location from using 1 nonprofit as a "front" to operate bingo. However, the Sheriff could not explain why the number 15 was chosen. He could not articulate any facts which led him to believe that bingo would be abused in such a manner. Clearly, this is an arbitrary requirement imposed by the Sheriff which serves no legitimate government interest. Instead, it operates to ensure a monopoly in a private corporation.

Additionally, the Sheriff amended his rules to cap the number of licensed nonprofit organizations who can hold Class B bingo licenses to 60. This was done knowing that the Macon County Greyhound Park already had contracts with 60 nonprofit organizations. The Sheriff stated that he imposed this limitation to comply with the Attorney General's directive to limit bingo gaming. However, the Attorney General issued no such directive. Further, the Sheriff stated that he imposed this limitation because of the demands that servicing the Macon County Greyhound Park placed on his department. The Sheriff did not limit bingo gaming at that particular facility. Instead, his limitation effectively shut out any future nonprofit organizations from obtaining Class B bingo licenses and any future corporations desiring to serve as qualified locations. The Sheriff admits that his rules and regulations have created a monopoly. This creation is not reasonably related to a legitimate state interest.

The Defendant's rules go far beyond simply limiting Bingo. The rules create a monopoly. Although the Defendant cites to cases which allows for government regulation of bingo, these cases do not stand for the premise that the government can go beyond its statutory authority. Here, the Defendant has gone beyond his statutory authority. Amendment 744 of the Alabama Constitution enables the Sheriff to promulgate rules to regulate bingo gaming in Macon County. The statute gives some general requirements that the Sheriff must ensure compliance. The Amendment prohibits anyone under the age of nineteen (19) from operating or playing bingo. The Amendment also requires any non-profit charity seeking a license to have been in existence for at least three years prior to making an application.

"A governmental entity does not have a legitimate purpose to regulate beyond the authority conferred by its enabling legislation." *Seventh Street, LLC v. Baldwin County Planning and Zoning Com'n*, 172 Fed.Appx. 918, 921, 2006 WL 531446, *2 (11th Cir. 2006). Regulations outside of this authority cannot be reasonably related to a legitimate governmental purpose. *Seventh Street*, 172 Fed. Appx. at 921. The Sheriff admits that he created the rules with the Macon County Greyhound Park in mind, and that no other entity in Macon County would be able to fit the requirements articulated in the rules. The Sheriff admits that he bingo gaming cannot be operated at any other facility in Macon County but the Macon County Greyhound Park. The Sheriff also admits that a non-profit organization wanting to obtain a Class B bingo license would have to wait until at least 15 of the non-profit organizations in a contractual agreement with the Macon County Greyhound Park fail to be licensed. The Sheriff acknowledges that the Macon County Greyhound Park has twenty-year contracts with the non-profit organizations to operate bingo gaming.

The enabling statute allows ***any*** non-profit organization to contract with ***any*** individual or firm to perform services in the operation of bingo for it. The Amendment places no limitations on the number of non-profit organizations which may be licensed in Macon County. The Amendment does not place a limitation on the number of facilities at which bingo gaming may be operated. The Amendment does not anticipate that the number of licensed non-profit organizations would be capped in such a way that one private corporation will be the sole operator of bingo in Macon County. To that end, the Amendment does not anticipate the promulgation of rules which would require a company to build a $15 million structure before it qualify as a location where bingo could be operated. Essentially, the Amendment does not authorize the Sheriff to structure a monopoly within the Macon County Greyhound Park as he has done with bingo gaming.

The Sheriff has exceeded his authority under Amendment 744 and has thus violated the Plaintiffs' right to equal protection under the laws of the State of Alabama. Therefore, the Defendant's Motion for Summary Judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record via this Court's electronic filing system on this the 22nd day of June, 2007.

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